

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SCOPE OF NEGOTIATIONS PROCEEDINGS

Proposed Readoption with Amendments: N.J.A.C. 19:13

Proposed March 6, 2006, at 38 N.J.R. 1309(a)

Adopted May 25, 2006 by the Public Employment Relations Commission, Lawrence Henderson, Chairman.

Filed: May 25, 2006, as R. _____, without change

Authority: N.J.S.A. 34:13A-5.4d, 34:13A-11, 34:13A-27.

Proposal Number: PRN 2006-068

Effective Date: Readoption: May 25, 2006
Amendments: June 19, 2006

Expiration Date: May 25, 2011

Summary of Public Comments and Agency Responses

Written comments were received from:

1. Michael A. Vrancik, Director of Governmental Relations, New Jersey School Boards Association (NJSBA).

2. B. Sachau Florham Park, NJ (via email)

COMMENT: Mr. Vrancik, on behalf of the NJSBA, supports the proposed changes as being positive for the parties and recommends the following additional changes.

1. Teaching staff member/school employee.

Mr. Vrancik referred to the Court's decision in Randolph Tp. Bd. of Ed. v. Randolph Ed. Ass'n, 328 N.J. Super. 540 (App. Div. 2000), certif. den. 165 N.J. 132 (2000), and described it as holding that the Commission "had the jurisdiction to determine the underlying nature of the withholding of non-certificated staff as well as teaching staff members' increments." He suggested that this holding be reflected in the regulations through these changes in the proposal:

N.J.A.C. 19:13-2.2(a)3 - change the two occurrences of the phrase "teaching staff member" to "school employee."

N.J.A.C. 19:13-2.2(a)4(iii) - change the two occurrences of the phrase "teaching staff member" to "school employee."

2. Stay of arbitration after filing of scope petition.

N.J.A.C. 19:13-2.2(c)

The Commission's proposed amendment would provide that "[t]he filing of a petition for scope of negotiations determination shall not stay the conduct of a grievance arbitration hearing, unless otherwise ordered by the commission or its named designee."

The NJSBA recognizes that this rule is intended to notify the parties that arbitration is not automatically stayed when a scope of negotiations petition is filed. It believes, however, that the rule may be construed to prevent parties or the assigned arbitrator from agreeing to postpone arbitration. It recommends the addition of this clarifying phrase at the end of the rule: "or a delay is agreed upon by both parties, or determined by the assigned arbitrator."

3. Contents of Briefs

On May 19, 2006, after the period for public comment had ended, Mr. Vrancik submitted additional comments on behalf of the NJSBA. This submission reiterates his earlier comments concerning N.J.A.C. 19:13-2.2(c). It also comments on N.J.A.C. 19:13-3.5(f) addressing the contents of briefs filed in scope of negotiations cases. Mr Vrancik suggests that the Commission's rule should reference and follow Court Rules R. 2:6-1 to R. 2:6-12. He states that practitioners are already familiar with such rules and doing so would enhance clarity.

AGENCY RESPONSE

The Commission thanks Mr. Vrancik and the NJSBA for their support of the proposed changes and their suggestions about additional changes.

1. Teaching staff member/school employee.

Randolph does not bar binding arbitration of "non-disciplinary" increment withholdings involving non-teaching staff. As discussed in Flemington-Raritan Bd. of Ed., P.E.R.C. No. 2003-64, 29 NJPER 113 (¶34 2003), Randolph held that non-disciplinary withholdings of non-teaching staff are not

subject to mandatory arbitration under N.J.S.A. 34:13A-29, but did not preclude a negotiated agreement allowing binding arbitration of all withholdings from non-teachers. See also East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd 11 NJPER 334 (¶16120 App. Div. 1985), certif. den. 101 N.J. 280 (1985). Almost all scope cases before the Commission involve negotiated grievance procedures ending in binding arbitration and in such cases the Commission will not determine whether a withholding involving a support staff employee is based on performance reasons or disciplinary reasons. The rule change suggested by the NJSBA is thus not required by Randolph and may confuse the parties by suggesting that the Commission will make a distinction that it will not in fact make. The Commission also notes that its proposed change tracks the statutory language. See N.J.S.A. 34:13A-22; N.J.S.A. 34:13A-27a and d, all of which use the phrase "teaching staff member."

For these reasons, the Commission declines to make the suggested changes.

2. Stay of arbitration after filing of scope petition.

The Commission agrees with the NJSBA that proposed N.J.A.C. 19:13-2.2(c) is not intended to preclude the voluntary postponement of an arbitration hearing or the granting of an adjournment by the arbitrator. The Commission's proposed change parallels other regulations providing that an action ordered by a Commission officer shall not be automatically stayed when review is sought before the Commission. See, e.g., N.J.A.C. 19:11-8.1(b). The Commission prefers to keep the wording of this rule consistent with its other rules.

The Commission does not believe that the suggested language is necessary to permit voluntary postponements or arbitrator adjournments. A grievance arbitration and a scope of negotiations case, while sometimes related, are separate proceedings. The former arises from the parties' contractual agreement and the arbitrator, not the Commission, is the presiding officer. A scope of negotiations petition commences an agency proceeding that will not result in any ruling on the merits of the grievance. Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 154 (1978). When the Commission restrains arbitration, its order applies directly to the two parties. The arbitrator is not a party to the scope of negotiations proceeding, but is essentially waiting in the wings. As arbitrators will customarily adjourn hearings when both parties agree to suspend or cancel an arbitration, the suggested language need not be added to keep these options open.

For these reasons, the Commission declines to make the suggested changes.

3. Contents of Briefs

The Court rules cited in Mr. Vrancik's comments concern the filing of briefs and appendices in the Superior Court, Appellate Division. These rules contain many technical requirements that are not applicable to scope of negotiations proceedings. Adoption of these rules by the Commission could result in the filing of unnecessary documents and pleadings and might confuse practitioners.

For these reasons, the Commission declines to make the suggested changes.

COMMENT

B. Sachau of Florham Park sent this email message:

The rules have not "generally worked well" at all. In fact, the taxpaying public has always LOST GROUND and paid more and more taxes year after year through PERC administration of benefits for state employees.

I do not think the commission itself adequately represents the taxpayers of New Jersey.

AGENCY RESPONSE

The Commission thanks B. Sachau for these comments. The proposed readoption with amendments does not address the administration of benefits received by state employees because the Commission does not administer state employee benefits. Some scope of negotiations petitions may involve disputes concerning the benefits received by public employees through negotiations or pursuant to statutes and regulations. The proposed readoption with amendments contains procedural rules and does not affect the existing precedents defining the scope of collective negotiations for public employees. Accordingly, the rules will not have any impact on how such cases are decided.

Federal Standards Statement

Because these rules are not subject to federal standards and requirements, a Federal exceedance analysis is not required. The National Labor Relations Act excludes from its coverage "any State or political subdivision thereof." 29 U.S.C. §152(2).

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:13.

Full text of the amendments to the readoption follows (additions in boldface **thus**; deletions shown in brackets [thus]):

§ 19:13-1.1 Nature of proceedings; limits of jurisdiction

(a) N.J.S.A. 34:13A-5.4(d) provides that the commission shall at all times have the power and duty, upon the request of any public employer or exclusive representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. **The procedure set forth in this chapter is intended to avoid protracted administrative litigation with respect to disputes that normally will involve solely questions of law and policy. Accordingly, scope of negotiations proceedings will normally be expeditiously resolved on the basis of the parties' submissions.**

(b) Where the dispute concerns the [With respect to the negotiability of a matter sought to be processed] **legal arbitrability of a grievance sought to be submitted to binding arbitration** pursuant to a collectively negotiated grievance/arbitration procedure, the commission will not determine:

(1) whether [that matter is within] **the grievance is covered by** the arbitration clause of an agreement[,];

(2) whether the facts are as alleged by the grievant[,];

(3) whether a contract provides a defense for the employer's alleged action[,];

(4) whether there is a valid arbitration clause in an agreement[,]; or

(5) any other similar question.

[The procedure set forth in this chapter is intended to effectuate that which the commission views as legislative intent to avoid protracted administrative litigation with respect to disputes which normally will involve solely questions of law and policy. It is accordingly anticipated that scope of negotiations proceedings will normally lend themselves to expeditious disposition on the basis of the parties' submissions, which the procedure set forth in this chapter is intended to accommodate.]

§ 19:13-2.1 Who may file

Any public employer or recognized or certified public employee exclusive representative, either individually or jointly, may initiate scope of negotiation proceedings by filing with the commission an original and [four]**nine** copies of a petition for scope of negotiations determination, together with proof of service of a copy of such petition upon the other party to the collective negotiations relationship. A copy of each such petition filed shall be retained in a public docket until the case is closed.

§ 19:13-2.2 Contents of petition for scope of negotiations determination

(a) A petition for scope of negotiations determination shall be in writing. **The party or representative filing the petition shall make this signed and dated certification: "I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief."** [and signed, and either shall be sworn to before a person authorized by the laws of this State to administer oaths or shall contain the following dated certification immediately preceding the signature of the person or persons signing it: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."] Such petition shall contain the following:

1. The full name, address and telephone number of the public employer [who]**that** is a party to the collective negotiations relationship;
2. The full name, address and telephone number of the recognized or certified public employee exclusive representative [who]**that** is a party to the collective negotiations relationship;

3. A clear and concise [statement] explanation of the matter or matters in dispute, [concerning which a determination by the commission is sought]which shall include a statement of the [facts in which the dispute arose] pertinent facts, and, in cases involving the withholding of an increment of a teaching staff member, shall be accompanied by a copy of the statement of reasons issued to the teaching staff member at the time the increment was withheld;

4. A statement that the dispute has arisen:

i. During the course of collective negotiations, and that one party seeks to negotiate with respect to a matter [or matters which] that the other party contends is not a required subject for collective negotiations; or

ii. With respect to the negotiability and legal arbitrability of a matter [or matters] sought to be [processed] submitted to binding arbitration pursuant to a collectively negotiated grievance procedure; or

iii. With respect to the legal arbitrability of a dispute as to whether the withholding of an increment of a teaching staff member is disciplinary or predominately relates to the evaluation of a teaching staff member's teaching performance; or

iv. Other than in subparagraphs I, [and ii] ii, and iii above, with an explanation of [the] any special circumstances warranting the exercise of the Commission's scope of negotiations jurisdiction.

5. A list of any other actions which the petitioner knows about that involve the same or a related dispute, before the Commission or any other administrative agency, arbitrator or court.

(b) A blank form for filing a petition for scope of negotiations determination may be downloaded from the Commission's website: www.state.nj.us/perc and is also available on request made to:

Public Employment Relations Commission, PO Box 429, Trenton, New Jersey 08625-0429.

(c) The filing of a petition for scope of negotiations determination shall not stay the conduct of a grievance arbitration hearing, unless otherwise ordered by the commission or its named designee.

§ 19:13-3.1 "Petitioner" or "respondent"

(No change)

§ 19:13-3.2 Intervention

A motion for leave to intervene in proceedings under this chapter shall be filed in writing with the commission or its named designee, stating the grounds upon which an interest in the proceeding is claimed and stating the extent to which intervention is sought. An original and nine copies of such motion shall be filed, together with proof of service of a copy of such motion upon the parties. The commission or its named designee may [be ordered]permit intervention to such extent and upon such terms as may be deemed just.

§ 19:13-3.3 Informal conference

(No change)

§ 19:13-3.4 Amendment; withdrawal; dismissal

(a) The chairman of the commission or such other person designated by the commission may permit the petitioner to amend its petition for scope of negotiations determination at any time upon such terms as may be deemed just. Filing, service, and proof of service of such amended petition for scope of negotiations determination shall conform to the provisions of these rules relating to the original petition for scope of negotiations determination.

(b) A petition for scope of negotiations determination shall be dismissed and the case closed if the petitioner files a notice of withdrawal of the petition for scope of negotiations determination at any time [subsequent to the filing of the charge and] prior to the issuance of the commission's decision. Unless otherwise stated in the notice of withdrawal, the dismissal is without prejudice.

(c) In the absence of a notice of withdrawal, the chairman of the commission or such other person designated by the commission may request the petitioner to file such notice. Where it appears to the chairman of the commission or such other person designated by the commission that the petitioner has no further interest in processing its petition [for scope of negotiations determination], that individual may, upon appropriate notice, deem the petition [for scope of negotiations determination] to have been withdrawn. Unless otherwise stated, a withdrawal and dismissal under this subsection is without prejudice.

§ 19:13-3.5 Notice of Filing; Additional Submissions; Case Processing, Briefs

(a) [The scheduling of the submission of briefs is intended to be consistent with the purposes of scope of negotiations procedures as set forth in N.J.A.C. 19:13-1.1 (Nature of proceedings). Therefore whenever possible the petitioner should file an original and nine copies of its brief, together with proof of service of a copy of such brief upon the respondent, simultaneously with the petition for scope of negotiations determination or as soon thereafter as possible. However, absent the grant of an extension of time for such filing, the petitioner's brief shall be filed within 14 days from the filing of the petition for scope of negotiations determination.] **No briefs or other legal argument shall be filed until the petitioner has received from the Commission a notice of filing. The notice may include a request for additional information.**

(b) The petitioner shall file a brief in support of its petition within 14 days of receipt of the notice of filing setting a briefing schedule, unless the chairman, or such other person designated by the commission, postpones the filing of briefs and advises the parties how the case will be processed. An original and nine copies of the brief shall be filed together with proof of service of a copy of such brief upon the respondent.

[(b)] **(c)** Within 14 days after the service of the petitioner's brief, the respondent shall file with the chairman or such other person designated by the commission an original and nine copies of its brief, together with proof of service of a copy of such brief upon the petitioner.

[(c)] **(d)** The petitioner may file with the chairman or such other person designated by the commission an original and nine copies of a reply brief within seven days after the service of

the respondent's brief, together with proof of service of a copy of such reply brief upon the respondent. No other briefs shall be served or filed without leave of the chairman or such other person designated by the commission.

[(d)] **(e)** The chairman or such other person designated by the commission may grant written requests for extensions of time within which to file briefs. Such request shall set forth the reasons for the request and the position of the other party regarding the requested extension.

(f) All briefs filed with the Commission shall:

1. Recite all pertinent facts supported by certification(s) based upon personal knowledge.

2. Cite all pertinent statutes, regulations and cases and, where the brief exceeds 20 pages in length, include a Table of Authorities.

3. Apply all relevant negotiability tests and precedents to the particular facts of the dispute.

4. Contain an appendix with all pertinent documents not previously filed.

§ 19:13-3.6 Request for evidentiary hearing

(a) Any party desiring an evidentiary hearing shall file with the chairman or such other person designated by the commission an original and two copies of a written request therefor, together with proof of service of a copy of such request[s] upon the other party. Such request shall be filed no later than five days from the receipt of respondent's initial brief. Failure to file a timely request for evidentiary hearing shall constitute a waiver of any right to such hearing. Any such request shall set forth in detail the [specific factual issues which the requesting party contends are] substantial and material disputed factual issues [necessitating] **that the requesting party contends neccessitate** an evidentiary hearing. Factual allegations not raised shall be deemed to be not in dispute.

(b) Upon a timely filing of such request, the other party shall within seven days from the service of the request file with the chairman or such other person designated by the commission an original and two copies of a written response to the request,

together with proof of service of a copy of the response upon the requesting party. The response shall specifically reply to each factual issue alleged to be in dispute by the requesting party and shall also state what, if any, additional factual issues not raised by the requesting party are alleged to be in dispute. Any factual issue not specifically responded to or raised in the response shall be deemed not to be in dispute.

(c) The request for an evidentiary hearing and response, together with the petition for scope of negotiations determination, shall constitute the pleadings for the evidentiary hearing.

§ 19:13-3.7 Evidentiary hearings

(a) If, following receipt of a timely request for an evidentiary hearing and a response pursuant to section 6 of this subchapter, it appears to the chairman of the commission or such other person designated by the commission that there exist substantial and material disputed factual issues, a notice of hearing shall be issued setting forth the time and place for the evidentiary hearing. Evidentiary hearings pursuant to this subchapter shall be conducted by a hearing examiner so designated by the chairman or such other person designated by the commission.

(b) Any such evidentiary hearing conducted pursuant to this subchapter shall be governed by the provisions of the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.) and N.J.A.C. 19:14-4.1 through 19:14-8.1 et seq. on unfair practice proceedings, insofar as applicable.

(c) After completion of the evidentiary hearing, or upon the consent of the parties prior to the conclusion of the evidentiary hearing, the hearing examiner shall prepare a [recommended] report and recommended decision, which shall contain findings of fact, conclusions of law, and recommendations as to what disposition of the case should be made by the commission. The hearing examiner shall file the original [thereof] with the commission, and shall [cause a copy to be served upon the parties. Upon service thereof upon the parties, which shall be complete upon mailing, the case shall be deemed transferred to the commission] serve a copy on the parties. Service shall be complete upon mailing and the case shall be deemed transferred to the Commission. The record in the case shall consist of the petition for scope of negotiations determination, the parties' briefs, the request for evidentiary hearing and any statement filed in response thereto, the notice

of hearing, the official transcript of the evidentiary hearing, stipulations, exhibits, documentary evidence, and depositions, together with the hearing examiner's [recommended] report and **recommended** decision and any exceptions, cross-exceptions, briefs, and answering briefs, which shall be governed by the provisions of N.J.A.C. 19:14-7.3 (Exceptions; cross-exceptions; briefs; answering briefs).

§ 19:13-3.8 Oral argument

(a) Proceedings under this chapter shall be submitted for the commission's consideration without argument, unless argument is requested by one of the parties within seven days after service of the respondent's brief or is ordered by the chairman or such other person designated by the commission, and said request is granted by the commission.

(b) [Such request shall be made by a separate paper, 10 copies of which shall be filed with the commission] **An original and nine copies of a request for oral argument shall be filed separately from any briefs or other prior submissions,** together with proof of service of a copy of such request upon the other party.

(c) The chairman or such other person designated by the commission shall notify the parties of the assigned argument date, if permission to argue orally is granted.

(d) The petitioner shall open and conclude argument. The commission may terminate the argument at any time it deems the issues adequately argued.

§ 19:13-3.9 Final determination

Based upon the parties' submissions and oral argument, if any, or where an evidentiary hearing has been conducted, based upon the record in the case as set forth in subsection (b) of N.J.A.C. 19:13-3.7 (Evidentiary hearings), the commission shall issue and cause to be served upon the parties its findings of fact and conclusions of law, including its determination as to whether the disputed matter is a required, permissive, or illegal subject for collective negotiations and, where appropriate, an order reasonably designed to effectuate the purposes of the act.

§ 19:13-3.10 Interim relief

Upon the filing of a petition for scope of negotiations determination or during the pendency of a scope of negotiations proceeding, the petitioner may apply to the chairman of the commission or such other person designated by the commission for an order requesting the respondent to show cause why specified interim relief should not be granted pending the disposition of the scope of negotiations proceeding. The request for specified interim relief shall be governed by the provisions of N.J.A.C. 19:14-9.1 et seq. on unfair practice proceedings, insofar as applicable.

§ 19:13-3.11 Motion for reconsideration

A motion for reconsideration may be filed **within five days** after the commission decision has been rendered in accordance with the provisions of N.J.A.C. 19:14-8.4 (Motion for reconsideration). **The movant shall specify the extraordinary circumstances warranting reconsideration.**